Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

PEDRO ALEJANDRO SALAZAR-HARO
Petitioner
vs.

IMMIGRATION AND NATURALIZATION SERVICE
Respondent

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the United States Supreme Court Appealing the decision of the United States Court of Appeals for the Third Circuit

---

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for the Petitioner
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51pp

QUESTIONS PRESENTED FOR REVIEW:

I. Should the Supreme Court grant certiorari to review the decision of the U.S. Court of Appeals for the 3rd Circuit which held that the Anti-terrorism and Effective Death Penalty Act of 1996 precluded the 3rd Circuit from reviewing the Petitioner's Final Order of Deportation?

II. Does the preclusion of review of final orders of deportation by the Federal Appellate Courts by the Antiterrorism and Effective Death penalty Act of 1996 violate Article I, Section 9, Paragraph 3 of the Federal constitution, which prohibits ex post facto legislation?

LIST OF PARTIES

All parties appear in the caption on the cover page.

TABLE OF CONTENTS

Questions Presented for Review i

List of Parties ii

Table of Contents iii

Table of Authorities, Cases iv

Table of Authorities,
Statutes & Regulations v

Petition 1

Opinions and Orders Below 2

Statement of Jurisdiction 3

Constitutional Provisions and
Statutes Involved 4

Statement of the Case,
Procedural History 6

Statement of the Case,
Factual History 7

Reasons for Granting the Writ 10

Conclusion 15

Contents of Appendix 16

TABLE OF AUTHORITIES - CASES

Landgraf v. USI Film Products, et al,
511 U.S. _, 114 S.Ct. 1483,
128 L.Ed.2d 229 (1994) 11

Duldulao v. I.N.S., 90 F.3d 396,
(9th Cir. 1993) 11

Haro v. I.N.S., 95 F.3d 309,
(3rd Cir. 1996) 2

Hernandez v. I.N.S., 89 F.3d 490,
(7th Cir. 1996) 13

Hincapie-Nieto v. I.N.S., 92 F.3d. 27,
(2rd Cir. 1996) 11

Kellogg v. Shoemaker, 46 F.3d 503
(6th Cir. 1995) 13

Mendez-Rosas v. I.N.S., 87 F.2d 672,
(5th Cir. 1996) 11

Nieto v. I.N.S., 92 F.3d 27,
(2nd Cir. 1996) 13

Reyes-Hernandez v. I.N.S. 89 F.3d 490,
(7th Cir. 1996) 11

Rosas v. I.N.S., 87 F.3d. 672,
(5th Cir. 1996) 13

Salazar-Haro v. I.N.S., 95 F.3d. 309,
(3rd Cir. 1996) 11

Stephens v. Muncy, 751 F.Supp. 1214
(E.D.Va. 1990) 12

U.S. v. Restrepo, 903 F.2d 648
(9th Cir. 1990) 13

TABLE OF AUTHORITIES

STATUTES & REGULATIONS

STATUTES:

Article 1, § 9, Paragraph 3,
United States Constitution 1, 4

Antiterrorism and Effective Death Penalty
Act of 1996, Pub.L. No. 104-132,
110 Stat. 1214 (1996) 4, 10

8 U.S.C. §1105a(a) 4, 10

8 U.S.C. §1105a(a)(10) 10

8 U.S.C. §1182(c), Sec 212(c) 6

8 U.S.C. §1252(b) 3

18 U.S.C. §2 6

18 U.S.C. §3231 3

21 U.S.C. §846 6

28 U.S.C. §1254(1) 4

REGULATIONS:

8 C.F.R. §3.1(B) 3

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

PEDRO ALEJANDRO SALAZAR-HARO
Petitioner
v.
IMMIGRATION AND NATURALIZATION SERVICE
Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner, Pedro Alejandro Salazar-Haro, respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit wherein the Court of Appeals held that the Antiterrorism and Effective Death Penalty Act of 1996 precluded judicial review of final deportation orders for resident aliens convicted of certain offenses.

Based upon their interpretation of the Act, the Third Circuit declined to review the Petitioner/resident alien's final order of deportation.

The Petitioner respectfully avers the decision and conclusion of the Third Circuit Court of Appeals is an improper construction of the Antiterrorism and Effective Death Penalty of 1996, and the decision of said honorable Court constitutes a violation of Article 1, § 9, clause 3 of the United States Constitution.

OPINIONS AND ORDERS BELOW

On the 13th of September, 1996, the United States Court of Appeals for the Third Circuit, before Judges Mansmann, Scirica, and Weis held, in a published opinion, Salazar-Haro v. I.N.S., 95 F.3d 309 (3rd Cir. 1996), that the Antiterrorism and Effective Death Penalty Act of 1996 precluded judicial review by the Court of Appeals for the Third Circuit of final deportation orders of resident aliens convicted of certain criminal offenses. The Third Circuit declined to review the Petitioner/resident alien's final order of deportation. The Opinion of the Court has been reported, and the Opinion and Order is transcribed in the appendix at page AAA.

By Memorandum of Decision and Order dated the 19th of December, 1995, the United States Department of Justice, The Board of Immigration Appeals, upheld the decision of Immigration Court dated the 28th of July, 1995, the Honorable John F. Gossart, Jr., presiding. The Immigration Board of Appeals held the Petitioner was not worthy of the discretionary relief he requested. The Memorandum of Decision and Order of the Board of Immigration Appeals was not reported. The decision is reprinted in the appendix at page BBB.

By Memorandum of Decision and Order dated the 28th of July, 1995, the United States Immigration Court, sitting in Philadelphia, Pennsylvania, the Honorable John F. Gossart, Jr., presiding, denied the Petitioner's request before the United States Immigration Court to find that he was statutorily eligible for a waiver of deportation under Section 212(c) of the Immigration and Naturalization

Act. The Memorandum of Decision and Order was not reported. The Memorandum of Decision and Order is reprinted in the appendix at page CCC.

On the 25th of June, 1993, the Petitioner was convicted of conspiracy to distribute cocaine in the United States District Court for the Eastern District of Pennsylvania. The verdict was not published, and the verdict is not reprinted or contained herein.

STATEMENT OF JURISDICTION

The Petitioner seeks review of the Decision and Order entered by the United States Court of Appeals for the Third Circuit on the 13th of September, 1996, and entered in lieu of Mandate on the 6th of August, 1996, holding the Antiterrorism and Effective Death Penalty Act of 1996 precluded and prohibited the Court from ruling upon the propriety of the final order of deportation imposed upon the Petitioner.

The subject matter jurisdiction of the United States District Court for the Eastern District of Pennsylvania was exercised pursuant to 18 U.S.C. §3231.

The subject matter jurisdiction for the United States Immigration Court in Philadelphia, Pennsylvania was exercised pursuant to 8 U.S.C.A. § 1252(b)

The subject matter jurisdiction of the United States Department of Justice - The Immigration Board of Appeals was exercised pursuant to 8 C.F.R. § 3.1(b).

The jurisdiction of the United States Court of Appeals for the Third Circuit was invoked pursuant to 8 U.S.C. §1105a(a), which empowers the Court of Appeals with jurisdiction to review all final decisions and orders of deportation.

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1254(1), authorizing review of a final judgment of the Circuit Court of Appeals by Writ of Certiorari, and pursuant to the Constitution of the United States, Article III, Section 2, Paragraph 2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statute involved is the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996). Title IV section 440(a) of the Act, codified at 8 U.S.C. Section 1105a(a)(10).

It states in relevant part:

> "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C) or (D) of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are covered by section 1251(a)(2)(A)(i) of this title, shall not be subject to review by any court."

The Constitutional provision involved is Article I, Section 9, third paragraph, of the

United States Constitution.

It states:

"No Bill of Attainder or ex post facto Law shall be passed."

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On April 6, 1991, the Petitioner was arrested and charged with for conspiracy to distribute cocaine, a violation of Title 21 U.S.C. §846, and aiding and abedding, Title 18 U.S.C. §2. The Petitioner was convicted on both counts in the United States District Court for the Eastern District of Pennsylvania on the 25th of June, 1993. All post-trial motions were denied, and there remain no appeals pending from the criminal trial.

On January 26, 1994, an Order to Show Cause was served upon the United States Immigration Court in Oakdale, Louisiana, to determine why deportation proceedings should not commence against the Petitioner. The Petitioner admitted to all the allegations in the Order to Show Cause, but he denied deportability. The Immigration Court in Oakdale entered an order of deportability on the 2nd of May, 1994. The venue of the case was then changed to the United States Immigration Court in Philadelphia, Pennsylvania because the Petitioner's place of residence was within the jurisdiction of that Court.

On February 6, 1995, the Immigration Court, sitting in Philadelphia, the Honorable John F. Gossart, Jr., presiding, received testimony and evidence as a result of the Petitioner's waiver of deportation pursuant to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. §1182(c). On the 28th of July, 1995, the Immigration Court declined to approve the Petitioner's waiver of application, and the Court ordered the Petitioner to be deported.

The Petitioner timely filed an appeal to the Board of Immigration Appeals pursuant to 8 C.F.R. §3.1b. The Petitioner conceded deportability, and the remaining issue before the Board was whether the Immigration Court properly denied Petitioner's requested relief from deportation under section 212(c) of the Immigration Act. On the 19th of December, 1995, the Board of Immigration Appeals found that the Immigration Court had properly denied the relief the Petitioner requested, and the Board of Immigration Appeals dismissed the appeal.

The Petitioner filed a timely notice of appeal, and on the 6th of August, 1996, the Petitioner filed with the United States Court of Appeals for the Third Circuit his petition requesting that the Court of Appeals review the final order of deportation. On the 13th of September, the Court of Appeals, before Circuit Judges Mansmann, Scirica, and Weis, held the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 deprived the Court of Appeals of jurisdiction, and the Court of Appeals Dismissed the Petition.

The Petitioner now files this Petition for Writ of Certiorari with the United States Supreme Court.

STATEMENT OF THE CASE

FACTUAL HISTORY

The Petitioner was born in Peru, and he is thirty-eight years old. He is a citizen of Peru, and he was married to a lawful permanent resident of the United States. He entered the United States on the 8th of September, 1983 at the age of twenty.

He began working with his brother-in-law at Emmaus Foundry located in Emmaus, Pennsylvania. There were no children born of this first marriage. He was divorced in 1989. In 1991, he became married for the second time, to Amada Morales. She was charged as a co-conspirator in the criminal prosecution of the Petitioner, and she has subsequently been deported. Three children were born of the second marriage; the ages of the three children are 12, 11, and 10. The children currently reside with the Petitioner in the United States.

During the proceedings of the United States Immigration Court, the Petitioner testified that he began to participate in the sale of controlled substances after the Emmaus Foundry closed in 1987. The Petitioner's activity resulted in his arrest in 1991, and he was convicted in 1993. The Petitioner co-operated with the police which resulted in several other arrests for drug offenses. He was imprisoned for approximately three years. The Petitioner completed his high-school diploma during imprisonment, and he was released for good time accrued.

The Petitioner testified before the Immigration Court that he has been rehabilitated, and, indeed, the Court did find that the Petitioner has been rehabilitated. The Petitioner detailed the reasons for his drug involvement: unemployment, a sick family member, and meeting the needs of his family. The Petitioner is currently gainfully employed, and he currently lectures juveniles about the woes of involvement with drugs.

Despite the fact that the Petitioner is a single parent, he and his three children have prospered. The children are enrolled in school, and two of his children attend school on art scholarships. The Petitioner testified about the hardships which would result to both him and his three children if they would be deported. The Petitioner also testified that his life would be in danger as a result of his co-operation leading to the arrest of drug traffickers originating out of Peru.

The Immigration Court found that the Petitioner was remorseful and rehabilitated. The Immigration Court found that the Petitioner had other favorable character traits. The Immigration Court, however, held that the Petitioner was not entitled to the discretionary relief requested, and the deportation of the Petitioner was ordered.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT SHOULD GRANT THE WRIT BECAUSE THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 DOES NOT PRECLUDE THE FEDERAL COURTS OF APPEAL FROM REVIEWING FINAL ORDERS OF DEPORTATION PENDING BEFORE THE COURT OF APPEALS AFTER THE ENACTMENT OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996.

II. THE SUPREME COURT SHOULD GRANT THE WRIT BECAUSE THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS HOLDING THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 PRECLUDING JUDICIAL REVIEW OF THE PETITIONER'S FINAL ORDER OF DEPORTATION IS A VIOLATION OF ARTICLE 1, § 9, PARAGRAPH 3, THE PROHIBITION AGAINST EX POST FACTO ENACTMENT.

I. On the 17th of January, 1996, the Petitioner filed with the Third Circuit Court of Appeals a petition to review his final order of deportation. At that time, 8 U.S.C. § 1105a(a) provided judicial review of such orders. On the 24th of April, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996), hereinafter "the Act".

Title IV, section 440(a) of the Act, codified at 8 U.S.C. § 1105a(a)(10) prohibits review of final orders of deportation by any court.

In its opinion, the Third Circuit Court of Appeals concluded that lack of jurisdiction prohibited review of the petition. **Salazar-Haro v. I.N.S.** 95 F.3d 309 (3rd Cir. 1996) at 311. The Third Circuit Court of Appeals reviewed the Act, and concluded that the effective date of section 1105a(a)(10) was the day of enactment. **Salazar-Haro**, supra, at 311. The Court believed that Congress could have permitted all pending cases, such as the Petitioner's, to be concluded under the old act. The Court reasoned that the withdrawal of jurisdiction, although disruptive of "settled expectations," does not effect preexisting rights. (Id.)

The Third Circuit Court of Appeals noted the general presumption against retroactive effect to statutes "burdening private rights." **Landgraf v. USI Film Products**, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). The Court of Appeals opinion referred to three other Circuit opinions reaching the same conclusion; **Hincapie-Nieto v. I.N.S.**, 92 F.3d 27 (2d Cir. 1996); **Duldulao v. I.N.S.**, 90 F.3d 396 (9th Cir. 1996); and **Mendez-Rosas v. I.N.S.**, 87 F.#d 672 (5th Cir. 1996).

The conclusion of the Third Circuit Court of Appeals and the other three cited circuit opinions are in contrast to, and conflict with, the decision of the Seventh Circuit in **Reyes-Hernandez v. I.N.S.**, 89 F.3d 490 (7th Cir. 1996).

In **Reyes-Hernandez**, Chief Judge Posner of the Seventh Circuit held that sections 440(a) and (d) did not apply to cases in which deportability was conceded before the Act became effective, so long as the applicant for discretionary relief had a colorable defense.

Chief Judge Posner reasoned that a new procedural or jurisdictional legislative provision will not be applied to a pending case causing a new legal consequence to a completed event unless Congress had clearly desired such a result.

In the case at bar, the Petitioner, as in **Reyes-Hernandez**, has conceded deportability, and he has a colorable defense. Furthermore, the presumption against retro-application of legislation prohibits the Third Circuit Court's conclusion. Congress could have chosen to specify an enactment date, and could have specified that all appeals in progress on that date would be subject to the new law. It did not do so. The Third Circuit's decision implies an enactment date which was not set by Congress and is not reflected in the Congressional Record.

II. On the 24th of April 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, hereinafter "Act". The Act is a crimes bill. A crimes bill defines criminal acts and imposes punishment upon those found in violation.

In the case of **Stephens v. Muncy**, 751 F.Supp. 1214 (E.D.Va. 1990) the court stated:

> "... An ex post facto law is one in which imposes punishment for an act which was not punishable at the time it was committed, or which imposes punishment in addition to that prescribed for the act at the time it was committed. Burgess v. Salmon, 97 U.S. 381, 24 L.Ed. 1104 (1878). In order to make out a

violation of the Ex Post Facto Clause, the accused must prove that the law applies to events occurring before its enactment, and that the accused is disadvantaged by it. Crowell v. U.S. Parole Comm'n, 724 F.2d 1406 (3d Cir. 1984). The prohibition against ex post facto laws is intended to ensure that an offender has notice of the criminality of and possible punishment for his offense. See United States v. Casson, 434 F.2d 415 (D.C.Cir.1970).

It is generally held that an ex post facto violation does not occur when the legislative enactment changes a mode of procedure which does not affect matters of substance. **U.S. v. Restrepo**, 903 F.2d 648, 655 (9th Cir. 1990). In the case of **Kellogg v. Shoemaker**, 46 F.3d 503, 509 (6th Cir. 1995), the Court stated that the distinction between substantive law and procedural law is elusive, and an ex post facto violation may occur when a substantial right is affected by procedure.

In the case at bar, the Act is ex post facto for several reasons: the Act imposes a greater punishment upon the Petitioner by prohibiting review of final orders of deportation by any court; the Act affects a substantial right by prohibiting a procedural form; and the Act prohibits review by a court which existed before enactment of the Act.

The Petitioner has been deprived of a substantial right. He has been subjected to the severest penalty a resident alien can suffer; deportation. The Third Circuit Court's

holding in this case deprives him of appellate review of the deportation decision. There is a direct and substantial conflict between Circuit Courts. The Third, Second, Ninth and Fifth Circuits have all held that they were precluded from reviewing Orders of Deportation. The Seventh Circuit has held that it was not. Certiorari should be granted to resolve the conflicts between the Circuits.

CONCLUSION

WHEREFORE THE DEFENDANT, Pedro Alejandro Salazar-Haro, by his counsel, Douglas B. Chester, Esq., respectfully asks the United States Supreme Court to grant Certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Dated December 11, 1996

BY:

Douglas B. Chester, Esq.,
for Pedro Alejandro Salazar-Haro

CONTENTS OF APPENDIX

Judgment Order, 3rd Circuit 15

Immigration Board of Appeals
Decision & Dismissal 23

Memorandum Opinion of Immigration Court
Decision & Order 28

PEDRO ALEJANDRO SALAZAR-HARO,
Petitioner

vs.

IMMIGRATION & NATURALIZATION SERVICE,
Respondent

No. 96-3007

United States Court of Appeals
Third Circuit

Submitted Aug 6, 1996.

Decided Sept. 13, 1996.

Alien petitioned for review of final deportation order that was based on his conviction for conspiracy to distribute cocaine. The Court of Appeals, Weis, Circuit Judge, held that provision of Antiterrorism and Effective Death Penalty Act of 1996 removing judicial review of final deportation order for aliens convicted of certain criminal offenses applied to preclude review of alien's deportation order.

Petition dismissed.

Richard J. Sharkey, Allentown, Pa., for Petitioner.

Frank W. Hunger, Assistant Attorney General, Civil Division, William J. Howard, Senior Litigation Counsel, Ernesto H. Molina, Jr., Office of Immigration Litigation, Civil Division, Department of Justice, Washington, DC, for respondent.

Before: MANSMANN, SCIRICA, and WEIS,

OPINION OF THE COURT

WEIS, Circuit Judge

After this petition for review of a deportation order was filed with us, Congress enacted a statute providing that such matters were not to be subject to review by any court. In the absence of language setting an effective date for the statute, we conclude that it became law on the day of enactment and withdrew our jurisdiction. Accordingly, we will dismiss the petition.

Petitioner, a native and citizen of Peru, entered the United States in 1978 and became a permanent resident in 1983. In June, 1993, he was convicted on charges of conspiracy to distribute cocaine and of aiding and abetting and was sentenced to forty-two months imprisonment. His wife Amada Morales, the mother of his three sons, was a co-defendant. She pleaded guilty and was deported to Nicaragua in 1994.

Petitioner was released from prison after thirty-seven months, and thereafter, was ordered to show cause why he should not be deported. After a hearing, the Immigration Judge found that the petitioner had been rehabilitated, was truly remorseful, had obtained a high school equivalency diploma, was caring for his three minor sons, who were United States citizens, and was gainfully employed. The Immigration Judge further found petitioner had cooperated with

the government in connection with his drug activities.

Weighing against these equities, however, the Immigration Judge noted that the petitioner had started selling drugs in 1987. After a year absence from the country, beginning in the middle of 1988, petitioner returned to the United States and resumed drug trafficking. After the death of the individual for whom he had sold drugs originally, petitioner made new contacts and began a business of his own. By his own testimony, he sold over ten kilograms of cocaine. "[W]hile this Court has heavily weighed the consequences of this decision on three U. S. Citizen children," the Immigration Judge concluded that "the well being of the community of the United States would nit be best served by allowing [petitioner] to remain in the United States."

After reviewing the merits of the case, the Board of Immigration Appeals denied Salazar-Haro's appeal.

The petition for review was filed in this court on January 17, 1995. At that time, 8 USC Section 1105a(a) provided for judicial review of all final orders of deportation. On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996). Title IV section 440(a) of the Act, codified at 8 U.S.C. Section 1105a(a)(10), states: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C) or (D) of this title, or any offense covered by

section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are covered by section 1251(a)(2)(A)(i) of this title, shall not be subject to review by any court."

In view of this statutory provision, the INS contends that we should dismiss the appeal for lack of jurisdiction. Petitioner points out that the Act does not specify the effective date of the pertinent section, and that generally, statutes are not applied retroactively. He also notes that precluding judicial review of administrative actions can give rise to constitutional concerns.

There can be little doubt that Congress has the power to deprive a Court of Appeals of jurisdiction previously granted over certain categories of cases. Ex Parte McCardle, 74 U.S. (7 Wall) 506, 19 L.Ed. 264 (1868). The issue before us is whether such action may retroactively affect cases commenced before the repealer, including those at various stages in the appellate process.

In McCardle, a statute permitting appeals in habeas corpus matters from the Circuit Courts to the Supreme Court was repealed after the case had been argued before the Supreme Court, but before entry of judgment. The Court held that "no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted." Id. (7 Wall) at 514. "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Id.

In more recent times, the Supreme Court has wrestled with the complex problems of statutory retroactivity, particularly when, as here, the legislation s silent as to both its effective date and congressional intention. In Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), the Court discussed the presumption against the retroactive legislation, noting: "Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress has made clear its intent." 511 U.S. at ---, 114 S.Ct. At 1499. On the other hand, "[w]e have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." Id. at -----, 114 S.Ct. At 1501. The Landgraf Court cited with approval Bruner v. United States, 343 U.S. 112, 116-17, 72 S.Ct. 581, 584-85, 96 L.Ed. 786 (1952), which stated: "This rule --- that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law --- has been adhered to consistently by this Court." See also The Assessors v. Osbornes, 76 U.S. (9 Wall) 567, 19 L.Ed. 748 (1869).

Therefore, unlike situations where retroactivity would affect pre-existing rights, withdrawal of jurisdiction, although realistically disrupting settled expectations, does not preserve pending litigation. Of course, by expressing its intention, Congress could provide that a court continue to process cases not yet adjudicated. Alternatively, Congress could direct the court to exercise its discretion, as is true with respect to procedural rules,

which are applicable to pending cases "insofar as just and practicable." No such language, however, appears in Title IV of the Antiterrorism Act.

We have carefully reviewed Title IV to determine whether Congress provided expressly, or by implication, that the effective date of the section under consideration here would be other than the day of enactment. We have found no such indication, and thus, agree with similar conclusions by the Courts of Appeals for the Second, Fifth and Ninth Circuits. See Hincapie-Nieto v. INS, 92 F.3d 27 (2nd Cir. 1996); Duldulao v. INS, 90 F.3d 396 (9th Cir. 1996); Mendez -Rosas v. INS, 87 F.3d 672 (5th Cir. 1996). We hold, therefore, that the amendment to 8 U.S.C. Section 1105a(a)(10) became effective on the day of enactment, April 24, 1996.

In addition to the three decisions by the Courts of Appeals cited above, we have carefully read the opinion of the United States Supreme Court of Appeals for the Seventh Circuit in Reyes-Hernandez v. INS, 89 F.3d 490 (7th Cir. 1996). There, the Court reasoned that it was unlikely Congress intended to withdraw jurisdiction where an applicant for discretionary relief had at least a colorable defense to deportability but conceded the fact in the administrative process in order to take his chances on appeal to the court. Although this approach is appealing, we do not find it persuasive. We hold, therefore, that the amendment to 8 U.S.C. Section 1105a(a)(10) is applicable to this case and withdraws our jurisdiction to review this petition on the merits.

We think it appropriate to note that our ruling is a narrow one and is confined to the circumstances in this case where the petitioner seeks review of a final order of deportation. Like the Hincapie-Nieto Court, we do not foreclose judicial review of all claims by aliens arising in the course of deportation proceedings.

The Supreme Court has repeatedly acknowledged that "the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune form judicial control." Fiallo v. Bell, 430 U.S. 787, 792, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50 (1977) (citations omitted). Consequently, Congress is free to make rules that would be unacceptable if applied to citizens. Id. Nevertheless, "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." Reno v. Flores, 507 U.S. 292, 306, 113 S.Ct. 1439, 1449, 123 L.Ed.2d 1 (1993) (citing The Japanese Immigrant Case, 189 U.S. 86, 100-01, 23 S.Ct. 611, 614-15, 47 L.Ed. 721, (1903)).

To the extent, therefore, that constitutional rights applicable to aliens may be at stake, judicial review may not be withdrawn by statute. See Felker v. Turpin, ___ U.S. ___, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996)(statutory limitation on Supreme Court's certiorari jurisdiction does not infringe on the Court's constitutional power to grant habeas corpus. See also McCardle, 74 U.S. (7 Wall) at 512-14; Hincapie-Nieto, 92 F.3d at 29-31 (noting possible habeas corpus remedies available to aliens under detention subject to final orders of deportation).

Because we do not have jurisdiction, the petition for review will be dismissed.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A38 267 921 - Philadelphia Date: Dec. 19, 1995

In re: PEDRO ALEJANDRO SALAZAR-HARO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Richard J. Sharkey, Esq.
515 Linden St., 3rd Floor
Allentown, Pennsylvania 18101

ON BEHALF OF SERVICE:
Kent J. Frederick
District Counsel

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. Section 1251 (a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Waiver of inadmissibility

We have jurisdiction over this timely appeal pursuant to 8 C.F.R. Section 3.1(b). Deportability has been conceded, and the respondent is statutorily eligible for the relief from deportation he seeks under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. Section 1182(c).

See Matter of Silva, 16 I&N Dec. 26 (BIA 1976). The only issue on appeal is whether the Immigration Judge properly denied that relief in the exercise of discretion. We find that he did, and the appeal will therefore be dismissed.

We have considered this matter by applying the well-established standards for exercising discretion in Section 212(c) cases set forth in Matter of Marin, 16 I&N Dec. 581 (BIA 1978). See also Matter of Roberts, Interim Decision 3148 (BIA 1991); Matter of Edwards, Interim Decision 3134 (BIA 1990).

The respondent, a 38-year-old native and citizen of Peru, was admitted to the United States as a lawful permanent resident in 1983. On June 25, 1993, he was convicted of conspiracy to distribute cocaine. We agree with the Immigration Judge that the respondent's serious criminal history triggers the need for a showing of unusual or outstanding equities. See Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988).

The appellate contentions notwithstanding, we conclude that the Immigration Judge correctly analyzed the positive and negative aspects of this case and, as did the Immigration Judge, we conclude that the respondent is unworthy of the favorable exercise of discretion. We agree that the respondent's United States citizen children constitute his sole outstanding or unusual equity. We further agree with the Immigration Judge that the respondent's children and his demonstration of rehabilitation do not offset the negative aspects of his criminal activity and conviction.

According to his testimony, the respondent began selling drugs in late 1987, and he continued until his arrest in April, 1991, except for a brief period when he returned to Peru. Although he now expresses remorse, we note that the respondent's drug enterprise, which included his wife and brother-in-law, was ended by his arrest, not by his unilateral decision to cease his criminal activity. We also note that the respondent availed himself of the profits of his drug trade, sending his children to private school, buying a grocery store, and providing medical treatment for his father in Peru. There is no evidence that the respondent, while having a decidedly negative impact on the community of the United States by operating a drug business, contributed anything of a positive nature during that period.

On appeal, the respondent, through counsel, maintains that the Immigration Judge erred in failing to determine whether or not his equities are unusual or outstanding. However, the Immigration Judge's written order reveals that he did indeed hold the respondent to the proper standard, and that he did evaluate the equities presented to determine if any were unusual or outstanding. While the Immigration Judge apparently made an error on calculating the length of respondent's lawful permanent residence, in stating that his residence was "nine and a half years", the respondent's residence is not unusual or outstanding, since for a considerable period of that residence, he was engaged in the drug trade or in prison therefor.

The respondent also argues that the

Immigration Judge improperly held his application to the standard of "whether or not it would be in the best interests of the community of the United States to allow [him] to remain...." However, that is precisely the standard to which section 212(c) applicants are held. See Matter of Marin, supra. The respondent does not meet the Marin test, and he is consequently unworthy of the favorable exercise of discretion.

It is further alleged that the Immigration Judge erred in concluding that the respondent sold 10 kilograms of cocaine over q period of 4 years, when such testimony was elicited by "leading' questions. We find nothing fundamentally unfair regarding the manner of questioning, and we note that the respondent freely admitted (Tr. At 58, 63) to having sold approximately 10 kilograms of cocaine. However, the precision of the respondent's memory in that regard is not critical, and whether he sold 10 kilograms, or 9 kilograms, or 8 kilograms of cocaine, the fact remains that he was involved in an active drug enterprise for a considerable length of time, an enterprise which was halted only by his arrest.

The respondent also maintains that the Immigration Judge erred in considering his incarceration as a negative factor. However, the record does not support that allegation. The Immigration Judge correctly concluded that a portion of the respondent's residence during which he was involved in the drug trade or in prison therefor should not inure to his benefit as an equity. The Immigration judge did, however, consider the respondent's good works and behavior in prison as indicative of his rehabilitation.

We are not unmindful of the disruption in his life, and that of his family, that the respondent's deportation will cause. However, the hardship attendant to the respondent's deportation will not be beyond that normally expected when one is repatriated to his native country, particularly when one is already an adult upon arrival in the United States.

ORDER: The appeal is dismissed.

------Signed------
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
PHILADELPHIA, PENNSYLVANIA

File No.: A 38 267 921

In the Matter of]] IN DEPORTATION

PROCEEDINGS
PEDRO SALAZAR]
Respondent]

Charges: Section 241(a)(2)(A)(iii), INA, aggravated felony (drug trafficking) conviction.

Application: Section 212(c) INA, waiver of inadmissibility (deportation).

ON BEHALF OF RESPONDENT:
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Philadelphia, Pa. 19110

ON BEHALF OF THE INS:
Kent Frederick, Esquire
District Counsel
1600 Callowhill Street
Philadelphia, Pa. 19130

MEMORANDUM OF DECISION AND ORDER

On February 6, 1995, the respondent, with counsel, appeared before the United States Immigration Court, Philadelphia, Pennsylvania, to present his application for a waiver of his inadmissibility (deportation) under section 212(c), of the Immigration and Nationality Act (hereinafter "INA"). At that hearing, respondent presented documentary

evidence for consideration by the Court which included the waiver application, as well as his testimony and the testimony of brother-in-law, Domingo Pizarro. At the conclusion of the merits hearing, the Court reserved its decision to further review the testimony and evidence presented.

BACKGROUND

The respondent is a native and citizen of Peru. He is 37 years of age, married, and al lawful permanent resident of the United States. He entered the United States last on September 8, 1983 as an immigrant. Subsequently, on June 25, 1993, in the United States District Court, Eastern District of Pennsylvania, the respondent was convicted under Title 21, United States Code, Section 846, for the offense of conspiracy to distribute cocaine. At the same time, the respondent was also convicted for aiding and abetting under Title 18 United States Code, Section 2. See Government Exhibit q and Respondent's Exhibit 2. As a result of the drug conviction, the respondent was placed in deportation proceedings, through the issuance of an Order to Show Cause dated January 26, 1994, wherein he has been charges as an alien subject to deportation for an aggravated felony (drug trafficking) convictions. The Order to Show Cause was served upon the Immigration Court initially in Oakdale, Louisiana thereby commencing these proceedings. Subsequently, the respondent entered a plea admitting to all of the allegations contained in the Order to Show Cause but denied the charge of deportability. The trial judge in Oakdale, Louisiana, upon review of the record of conviction received into the record (initially as Exhibit 2 and

redesignated by this Court as Government Exhibit 1), entered a finding of deportability against respondent on May 2, 1994.

The respondent's case was venued to the jurisdiction of the Immigration Court, Philadelphia, Pennsylvania, in order to permit the respondent to present his waiver application in the jurisdiction of his residence.

As noted, the respondent appeared before this Court on February 6, 1995, wherein the Court heard the respondent's petition for a waiver of his deportation and reserved its decision to further review the testimony and evidence of record.

POSITION OF THE PARTIES

The Respondent

The respondent requests this Court find that he is statutorily eligible for a waiver of his deportation under Section 212(c), INA, conclude that he is remorseful and rehabilitated for his criminal misconduct, is an individual of sufficient equities to include outstanding or unusual countervailing equities, and thus worthy of an exercise of discretion to permit him to remain in the United States as a lawful permanent resident. The respondent asks this Court to give consideration to himself and his family, particularly his three United States citizen children and grant his waiver request.

In support of his petition for waiver of deportation, the respondent has presented to the Court for consideration the following

evidence:

Respondent Exhibit 1 - application for waiver of deportation, Form I-191, which includes an offer of employment letter for respondent to the Oakdale, Louisiana judge while the case was proceeding in that jurisdiction; a letter from the respondent's brother-in-law and witness asserting respondent's community involvement with the soccer club and local council in Allentown, Pennsylvania; a letter from respondent's oldest son, to the Immigration Judge in Oakdale, Louisiana asking that the family be allowed to be reunited again, a drawn picture to the Immigration Judge in Oakdale, Louisiana from respondent's younger son and a letter of support and family background with a request for consideration of a second chance to the respondent from the Inglesia Luterana San Martin De Porres Ministry signed by Reverend Ivis La Riviere-Mestre.

Respondent Exhibit 2 - judgement of criminal conviction dated June 25, 1993.

Respondent Exhibit 3 - divorce decree dated January 10, 1989 between respondent and his first wife, Dolores A. Salazar.

Respondent Exhibit 4 - certificate of marriage between the respondent and his present wife, Amada Antonia Morales, dated March 16, 1991.

Respondent Exhibit 5 - birth certificate of the respondent's oldest United States citizen son, Carlex Alex Salazar.

Respondent Exhibit 6 - birth certificate of the respondent's second United States citizen son, Jair Salazar-Morales.

Respondent Exhibit 7 - birth certificate of the respondent's third United States citizen son, Anthony Joshua Salazar.

Respondent Exhibit 8 - social security cards for the respondent and his three United States citizen children.

Respondent Exhibit 9 - Federal Bureau of Prisons progress report with regard to respondent's incarceration dated December 31, 1993.

Respondent Exhibit 10 - high school GED diploma accorded to the respondent while in prison dated January 10, 1995.

Respondent Exhibit 11 - letter from the respondent's U.S. probation officer Joshua Santana, dated January 10, 1995.

Respondent Exhibit 12 - additional letter from Reverend Ivis La Riviere-Mestre dated February 5, 1995 in support of the respondent's waiver wherein it is represented that the respondent is a member of the church, a regular participant, and one who does voluntary service at the church.

In addition, the respondent presented his testimony and the testimony of his brother-in-law, Domingo Pizarro.

The respondent's brother-in-law and witness, Domingo Pizarro, testified that he

is a lawful permanent resident alien of the United States born in Lima, Peru. He is married to the respondent's sister. He testified that when the respondent first came to the United States in 1978, he lived with his family for approximately eight months. The witness noted that he was able to secure a job for the respondent as a laborer with the Emmaus Foundry and that the witness and the respondent worked together at the foundry for approximately eight years. The witness noted that after the respondent was released form custody, he again lived with him for approximately six months and is presently working part time at his restaurant and bar in the kitchen.

Under cross-examination, the witness testified that while the respondent was incarcerated for approximately three years, he and his wife cared for the children. He noted that they did receive welfare assistance in order to provide for the children and the witness testified that he believes that the respondent is presently receiving welfare assistance for the support of his three U.S. citizen children. Under cross-examination, the witness also testified that he was aware that his brother-in-law, the respondent, was selling drugs and knew about this for approximately one year before he was arrested. The witness also confirmed to the Court that he visited the respondent often while he was in many jails during his three years of incarceration.

Under redirect examination, the witness did note that while he wanted to talk to his brother-in-law about his involvement in drugs when he first became aware of it, his wife had told him not to.

The respondent testified that he first came to the United States in 1978 at the age of 20. Having no relatives in the United States, he initially took up residence at his sister's home. In Lima, Peru, where he was born, he attended high school and then subsequently went to Venezuela where he stayed for a year learning a trade in welding. On his arrival in the United States, he began to work with his brother-in-law, Domingo Pizarro, at the Emmaus Foundry as a laborer. In 1978, he also met his first wife, Dolores Weller, and they were married. Subsequently divorced in 1989, there were no children born of this marriage. In 1991, he married Amada Morales and they had three United States citizen sons. The children are now ages 11, 10 and 9.

The respondent testified that after the foundry closed, he worked in restaurants as a dishwasher and attended community college to learn English. Sometime in 1987, the respondent was approached by an individual to participate in the sale and distribution of drugs. According to the respondent, he became involved and this resulted in his arrest in 1991 and conviction in 1993. The respondent testified that he cooperated with federal officials and testified against two of his co-defendants which resulted in their convictions and present incarceration. As a result and for the protection of the respondent, he was transferred to many different jails during the course of his three years of incarceration.

The respondent's testimony was replete with remorse for the offense committed. He noted that at the time he became involved in drugs, he was working as a dishwasher and not

making much money. He was shown by an individual how he could make a lot of money very easily and that is how he got involved in the selling of drugs. There is also some indication by the respondent that he was initially drawn into the selling of drugs unknowingly in that he, himself, was "drugged' by this individual. At any rate, there is testimony that the respondent did use drugs occasionally while selling those drugs.

The respondent testified as to his rehabilitation in prison. He continuously noted to the Court his remorse and noted that in prison he worked and secured his high school diploma. He also testified and noted that he cooperated fully with federal agents and although sentenced to 42 months of incarceration, he was re eased after 36 months because of good time accrued. Respondent also testified that his children know of his entire involvement and his conviction and that he is teaching his children not to get in trouble, not to get involved in drugs. He noted that presently he speaks to others who are troubled and involved with drugs at his church.

The witness also noted that when he did get involved in the sale of drugs, he knew it was wrong but was doing it for the money. He noted that he used this money to send his children to private school and also to provide medical expenses for his now deceased father after he had suffered two strokes and a heart attack. Respondent noted that in 1988 and 1989 for approximately one year, he departed the United States and returned to Peru to be of help to his ailing father.

The respondent also noted that his wife, his wife's brother and two other Peruvians were all indicted with him and involved in the distribution of cocaine. As noted, he testified against the two fellow Peruvians, and he testified that his wife pled guilty and was deported in May of 1994 to Nicaragua. Presently, the respondent is living as a single parent, taking care of and supporting his three Unites States citizen sons.

Respondent testified that his children are readjusting to him and are presently doing well in school with two of his children on art scholarships. In this connection, the respondent testified that it would be a grave hardship upon his children if he were deported. Indeed, the respondent has not considered what would happen to the children if he is required to go to Peru. He noted that presently in Peru is his elderly mother, one brother and some sisters. Respondent also testified that it would be difficult for him to return to Peru and further that he is afraid to return to Peru because of the families of the individuals who he testified against could take revenge upon him. Indeed, the respondent testified that his mother has warned him of the dangers if he comes back to Peru.

In sum, the respondent has asked the Court to find him worthy of a favorable exercise of discretion and allow him a second chance to remain in the United States as a continuing permanent resident.

<u>The INS</u>

The Immigration and Naturalization

Service, (hereinafter "INS") opposes the application for waiver of deportation as a matter of discretion. They note that the respondent was convicted of a serious aggravated felony, to wit distribution of drugs, in the United States. Moreover, the agency does not believe it is in the best interests of the United States to allow the respondent to remain in this country. The agency also argues that the respondent's equities do not rise to the level of outstanding or unusual countervailing equities, equities that they believe are necessary in the light of the facts and circumstances of this case. The agency asks that this Court order the deportation of the respondent to Peru.

STATUTE, REGULATIONS, CASE LAW

Section 2122(c) and its applicability

Section 212(c) of the INA provides that

> [a]liens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General.... Nothing contained in this section shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of

imprisonment of at least five years.

INA Section 212(c) (1992), This section was originally applied only as a waiver of excludability available to lawful permanent residents who sought to re-enter the U.S. after a temporary absence or to obtain an advance waiver in contemplation of a future absence. It was judicially expanded to also include those aliens who had not departed the U.S. See Francis v. INS, 532 F.2d 268 (2d Cir. 1976). In Francis, the Court found that the statute created two classes of aliens identical in every respect except that one class had departed and returned to the U.S. and held that to limit the Section 212(c) waiver to those who departed and returned deprived those who had not departed of equal protection of the laws under the Fifth Amendment. Id. At 273. The BIA accepted this interpretation in Matter of Silva, 16 I&N Dec. 26 (BIA 1976) and Section 212(c) has since been available as relief in deportation proceedings as well as in exclusion proceedings.

To satisfy the statutory requirement of section 212(c), the BIA has held that seven (7) years of lawful domicile must be acquired after the individual has been granted lawful permanent residency. See Mater of Cerna, Int Dec. 3161 (BIA 1991); Matter of Newton, 17 I&N Dec. 133 (BIA 1979); Chiravacharadhikul v. INS, 645 F.2d 248 (4th Cir. 1981). Moreover, while an alien in deportation proceedings may make an application for a waiver of inadmissibility under Section 212(c), in order to assert eligibility for the waiver, the ground of deportability with which the respondent is charged must have a comparable ground of excludability. See

Matter of Hernandez-Casillas, Int Dec. 3147 (BIA 1990; A.G. 1991); Matter of Wadud, 19 I&N Dec. 182 (BIA 1984); Matter of Grandos, 16 I&N Dec. 726 (BIA 1979).

A showing of statutory eligibility, however, is not all that is required for a grant of Section 212(c) relief. Rather, the immigration judge is required to balance the adverse factors of record evidencing an alien's undesirability as a permanent resident against the favorable factors and social and humane considerations to determine if the granting of relief is in the best interest of the United States. Matter of Marin 16 I&N Dec. 581 (BIA 1978). The BIA has articulated factors both favorable and adverse that it deems appropriate in balancing the equities and adversities presented to determine whether or not discretion is appropriate.

Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other such evidence attesting to a respondent's good character, such as affidavits from family friends, and responsible community representatives. Marin, 16 I&N Dec. at 584-85 (and cases cited therein); see also Matter of Salmon, 16 I&N Dec. 734 (BIA 1978); Matter

of Khalik, 17 I&N Dec. 518 (BIA 1980).

Among the negative factors to be considered are the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, relevancy, seriousness, and the presence of other evidence indicative of a respondent's bad character of undesirability as a permanent resident of this country. See cases immediately cited above in addition to Matter of Carrasco, 16 I&N Dec. 195 (BIA 1977; Aff'd sub nom on other grounds, Carrasco-Favela v. INS, 563 F.2d 1220 (5th Cir. 1977); Matter of V, 1 I&N Dec. 293 (BIA 1942) (seventh proviso). A respondent's lack of remorse or refusal to accept responsibility for criminal acts may be considered as an adverse factor in the exercise of discretion. Khalik, 17 I&N Dec. at 520; see also Matter of Edwards, Int. Dec. 3134 (BIA 1990).

In Marin, the BIA articulated three distinct levels of positive discretionary factors which may apply, depending upon the nature of the underlying ground for exclusion or deportation. Without elaboration, the BIA explained that some cases may warrant an application of a minimum standard of eligibility for section 212(c) relief (i.e. residence of at least seven years and status as a lawful permanent resident) may be sufficient in and of themselves to warrant favorable discretionary action" Marin, 16 I&N at 585 (emphasis added). The mid-level standard has been set out above; specifically a balancing of adverse factors and offsetting favorable equities. However, where the case

involves a serious criminal record or other very serious negative factor, a higher standard of eligibility has been applied. In those cases, the BIA has required a showing of unusual or outstanding equities before relief will be considered as a matter of discretion. Id. At 585, 586 n.4.

The necessity of demonstrating unusual or outstanding equities may be required by the presence of a conviction for a single serious crime such as an offense involving controlled substances. Matter of Buscemi, 19 I&N Dec. 628, 633 (BIA 1988). However, an alien who demonstrates unusual or outstanding equities when required merely satisfies the threshold test for having a favorable exercise of discretion considered in his case; such a showing does not compel that discretion be exercised in his favor. Id. At 634.

The Court ultimately is balancing the adverse factors of record evidencing the undesirability of the alien as ap permanent resident, with the social and humane factors, equities, and hardship presented, must determine if the granting of the application is in the best interest of the United States.

FINDINGS OF THE COURT

After careful consideration of all the testimony and evidence presented to the Court, firstly, the Court finds that the respondent has been forthright in his testimony to include testimony against his interest. Secondly, the Court finds that the respondent's testimony which is replete with remorse is genuine. The Court is satisfied

that the respondent is remorseful having been punished for a serious drug conviction. Moreover, there is an indication that the respondent has rehabilitated himself beginning with his concessions of guilt and further with his cooperation with the United States Government in testifying against others. Additionally, the respondent was released form incarceration six months prior to the minimum sentence required because of good time served. Moreover, the record reflects that the respondent earned his GED, high school equivalency diploma, while incarcerated. Finally, the record reflects that since his release from prison, the respondent has been taking care of his three U.S. citizen children, working and participating in his church community with his children to include speaking to those involved in drugs. The record also reflects that the respondent has spoken to his children regarding his serious criminal misconduct.

Next, the Court in the instant case does require that the respondent's equities as presented is deemed to be outstanding or unusual countervailing equities because of the serious conviction and the circumstances regarding that conviction which was testified to by the respondent. Of course, the most substantial equities presented by the respondent are his three U.S. citizen children. Their mother has already been deported for her involvement in drug trafficking to the country of Nicaragua where she is a native and citizen.

This Court, indeed, has weighed the evidence presented very carefully particularly in consideration for the three

innocent U.S. citizen children. But, in weighing those societal and humane considerations presented, the Court must also balance that with the interest and well being of the community of the United States and ultimately decide whether or not it would be in the best interest of the well being of the community of the United States to allow the respondent to remain. In this particular case, the Court cannot, as a matter of discretion, reach that conclusion. Under testimony and examination, the respondent admitted that he began selling drugs in 1987 and continued in 1988. He stopped selling the drugs in 1988 because he returned to Peru to tend to his ailing father. In order to avoid the loss of his permanent residence after approximately one year in Peru, the respondent returned to the United States. He again immediately began to sell drugs and continued to do so until his arrest on April 6, 1991. The record reflects that the respondent initially got involved through some other individual and sold drugs for this individual. However, he soon became an entrepreneur after the death of the individual he was working for and selling drugs for, secured his own contacts and his own clients (approximately three or four clients by his testimony) and began selling drugs on his own. Over the course of the years that the respondent was involved in the sale of drugs, by his testimony, he sold over 10 kilos of cocaine. Indicted with his wife, a brother-in-law, and two Peruvians, he was brought to justice. Respondent's brother-in-law remains a fugitive from justice, and his wife has been deported. The record indicates that the respondent was heavily involved in the sale of drugs for at least four years in the United States, and apparently derived

substantial monies from this venture. Respondent sent his children to private school, provided for the medical treatment of his father in Peru, and also bought his own grocery store. The record reflects that the respondent stopped his involvement in drugs only when he was caught, only when he was charged and subsequently incarcerated.

The aggravated felony conviction against this respondent, when weighing the facts and circumstances behind this conviction, is extremely serious. Respondent in nine and a half hears as a lawful permanent resident in the United States has spent three of those years incarcerated and an additional four years selling drugs. Thus, out of nine and one-half years, the respondent's negative record equates to approximately seven years of bad conduct and/or punishment.

As noted, the Congress of the United States, through immigration legislative history, has long treated drug offenders (aggravated felons) more harshly than others who transgress our laws. While this Court does conclude that the respondent is truly remorseful and is rehabilitating himself, and while this Court has heavily weighed the consequences of this decision on three U.S. citizen children, it is concluded that based on this record, the well being of the community of the United States would not be best served by allowing respondent to remain in the United States as a continuing permanent resident. Thus, the Court declines to exercise discretion and will order the deportation of the respondent.

Accordingly, what follows is an appropriate order.

July 28, 1995

---signed---
John F. Gossert, Jr.
U.S. Immigration Judge
Sitting at Philadelphia, Pa.

Supreme Court, U.S.
FILED
APR 21 1997
CLERK

No. 96-1310

In the Supreme Court of the United States

OCTOBER TERM, 1996

PEDRO ALEJANDRO SALAZAR-HARO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which precludes judicial review of final orders of deportation entered against aliens who have been convicted of certain serious crimes, divested the court of appeals of jurisdiction over a petition for review that was pending at the time of the AEDPA's enactment.

2. Whether Section 440(a)'s withdrawal of jurisdiction over pending cases violates the Ex Post Facto Clause.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Arevalo-Lopez v. *INS*, 104 F.3d 100 (7th Cir. 1997)	10
Assessors v. *Osbornes*, 76 U.S. (9 Wall.) 567 (1870)	8
Boston-Bollers v. *INS*, 106 F.3d 352 (11th Cir. 1997)	9
Bruner v. *United States*, 343 U.S. 112 (1952)	7
Bugajewitz v. *Adams*, 228 U.S. 585 (1913)	12
California Dep't of Corrections v. *Morales*, 115 S. Ct. 1597 (1995)	12
Chamorro-Torres v. *INS*, No. 96-985 (Mar. 3, 1997)	5
Collins v. *Youngblood*, 497 U.S. 37 (1990)	11
De La Rama Steamship Co. v. *United States*, 344 U.S. 386 (1953)	8
Demarest v. *Manspeaker*, 498 U.S. 184 (1991)	11
Dobbert v. *Florida*, 432 U.S. 282 (1977)	12
Duldulao v. *INS*, 90 F.3d 396 (9th Cir. 1996)	8, 9
Figueroa-Rubio v. *INS*, No. 96-3415 (6th Cir. Mar. 5, 1997)	9
Galvan v. *Press*, 347 U.S. 522 (1954)	11
Gurnee v. *Patrick County*, 137 U.S. 141 (1890)	8
Gwin v. *United States*, 184 U.S. 669 (1902)	7-8
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952)	11, 12
Heller v. *Doe*, 509 U.S. 312 (1993)	11
Hincapie-Nieto v. *INS*, 92 F.3d 27 (2d Cir. 1996)	9, 10

Cases—Continued: Page

INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984) 6, 11
Insurance Co. v. *Ritchie*, 72 U.S. (5 Wall.) 541 (1867) 8
Kline v. *Burke Constr. Co.*, 260 U.S. 226 (1922) 7
Kolster v. *INS*, 101 F.3d 785 (1st Cir. 1996) 9
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 6, 7, 8, 9, 10, 12
Lynce v. *Mathis*, 117 S. Ct. 891 (1997) 11
Mahler v. *Eby*, 264 U.S. 32 (1924) 12
Marcello v. *Bonds*, 349 U.S. 302 (1955) 11
McCardle, Ex parte, 74 U.S. (7 Wall.) 506 (1869) 8
Mendez-Rosas v. *INS*, 117 S. Ct. 694 (1997) 5
Mendez-Rosas v. *INS*, 87 F.3d 672 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997) 8, 9
Qasguargis v. *INS*, No. 96-806 (Feb. 24, 1997) 5
Railroad Co. v. *Grant*, 98 U.S. 398 (1879) 8
Reyes-Hernandez v. *INS*, 89 F.3d 490 (7th Cir. 1996) 4, 9
Sanchez-Rodriguez v. *INS*, No. 96-9518 (10th Cir. 1996) 9
Scheidemann v. *INS*, 83 F.3d 1517 (3d Cir. 1996) ... 6
Sherman v. *Grinnell*, 123 U.S. 679 (1887) 7-8
Uwagbale v. *INS*, No. 96-7454 (Mar. 31, 1997) 5
Yang v. *INS*, Nos. 94-3071, 95-3665, 96-1824 (7th Cir. Mar. 18, 1997) 10

Constitution, statutes, and regulation:

U.S. Const.
Art. I, § 9, Cl. 3 (Ex Post Facto Clause) 11, 12
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 3
§ 440(a), 110 Stat. 1276-1277 ..... 3, 4, 7, 8, 9, 11
§ 440(d), 110 Stat. 1277 ..... 3, 5, 6
§ 440(e), 110 Stat. 1277 8
§ 440(f), 110 Stat. 1278 8

Constitution, statutes, and regulation—Continued: Page

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., § 304, 110 Stat. 3009 5
§ 304(a)(3) 5
§ 304(b) 5
§ 309(a) 6
§ 309(c) 6
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
§ 101, 8 U.S.C. 1101(a)(43)(B) 5
§ 106(a), 8 U.S.C. 1105a(a) 3
§ 106(a)(10), 8 U.S.C. 1105a(a)(10) 3, 11
§ 212(c), 8 U.S.C. 1182(c) 2, 3, 5, 6, 7, 9
§ 240A(a)(3), 8 U.S.C. 1229b(a)(3) 5, 6
§ 241(a)(2)(A)(iii), 8 U.S.C. 1251(a)(2)(A)(iii) 2, 4
18 U.S.C. 2 2
21 U.S.C. 846 2
8 C.F.R. 3.1(h)(iii) 6

Miscellaneous:

Soriano, In re (Op. of the Att'y Gen'l, Feb. 21, 1997) 6
142 Cong. Rec. H11,787-H11,833 (daily ed. Sept. 28, 1996) 5

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1310

PEDRO ALEJANDRO SALAZAR-HARO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-22) is reported at 95 F.3d 309. The opinions of the Board of Immigration Appeals (Pet. App. 23-27) and the immigration judge (Pet. App. 28-45) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1996. The petition for a writ of certiorari was filed on December 11, 1996. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Peru, entered the United States as a legal permanent resident in September 1983. Pet. App. 16. In 1993 petitioner was convicted of conspiracy to distribute cocaine, in viola-

tion of 21 U.S.C. 846, and of aiding and abetting, in violation of 18 U.S.C. 2. Pet. 6. He was sentenced to 42 months in prison. Pet. App. 16.

In January 1994 the Immigration and Naturalization Service (INS or Service) commenced deportation proceedings against petitioner on the ground that his conviction for the aggravated felony of drug trafficking rendered him deportable under Section 241(a)(2)(A)(iii) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(A)(iii). Pet. App. 29. Petitioner conceded the Service's factual allegations, but he denied deportability. *Ibid.* After reviewing the record of petitioner's convictions provided by the INS, the immigration judge (IJ) found petitioner to be deportable as charged. *Id.* at 29-30. Petitioner then requested a discretionary waiver of deportation under Section 212(c) of the INA, 8 U.S.C. 1182(c). Pet. App. 30.

The IJ denied petitioner's application for a waiver of deportation. Pet. App. 44. Applying standards previously adopted by the Board of Immigration Appeals (BIA or Board), the IJ held that petitioner, because of his conviction for a serious felony, would have to show "unusual or outstanding equities" in order to be eligible for a favorable exercise of discretion. *Id.* at 42. After carefully considering the evidence submitted by petitioner and the equities weighing in his favor (*id.* at 30-36, 41-43), the IJ concluded that petitioner's equities were outweighed by his history of illegal activity (*id.* at 43-44), and that "the well being of the community of the United States would not be best served by allowing respondent to remain in the United States" (*id.* at 44). The IJ therefore declined to grant petitioner's application for a discretionary waiver, and ordered him deported. *Ibid.*

The BIA affirmed. Pet. App. 23-27. The Board agreed with the IJ that petitioner would have to show unusual or outstanding equities in order to merit a waiver of deportation. *Id.* at 24. In the exercise of its discretion, the Board concluded that petitioner's relationship to his United States citizen children and his demonstration of remorse and rehabilitation were not sufficient to offset his history of criminal activity. *Ibid.*

2. Petitioner sought review of the BIA's final order of deportation in the United States Court of Appeals for the Third Circuit, under the provision for such review contained at that time in Section 106(a) of the INA, 8 U.S.C. 1105a(a).

On April 24, 1996, while the petition for review was pending, the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Section 440(a) of the AEDPA, 110 Stat. 1276-1277, amended Section 106(a)(10) of the INA (previously codified at 8 U.S.C. 1105a(a)(10)) to provide, in pertinent part:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D) * * * shall not be subject to review by any court.

Section 440(d) of the AEDPA further amended Section 212(c) of the INA, 8 U.S.C. 1182(c), to eliminate the Attorney General's authority to grant discretionary relief from deportation to any alien who "is deportable by reason of having committed any [such] criminal offense." 110 Stat. 1277.

The court of appeals dismissed the petition for review for lack of jurisdiction in light of the AEDPA.

Pet. App. 15-22. Because petitioner is deportable under Section 241(a)(2)(A)(iii) of the INA (previously codified at 8 U.S.C. 1251(a)(2)(A)(iii)), by reason of having committed an aggravated felony, the court concluded that Section 440(a) of the AEDPA precludes judicial review. Pet. App. 19. The court "carefully reviewed Title IV [of the AEDPA] to determine whether Congress provided expressly, or by implication, that the effective date of [Section 440(a)] would be other than the day of enactment." *Id.* at 20. Finding "no such indication," the court "agree[d] with similar conclusions by the Courts of Appeals for the Second, Fifth and Ninth Circuits" and held that the amendments limiting the courts of appeals' jurisdiction became effective upon enactment on April 24, 1996. *Ibid.*

The court found "unpersuasive" the decision in *Reyes-Hernandez* v. *INS*, 89 F.3d 490 (1996), in which the Seventh Circuit asserted continuing jurisdiction, under limited circumstances, over a petition for review filed before enactment of the AEDPA. Pet. App. 20. The court nonetheless noted that its ruling was "confined to the circumstances in this case where the petitioner seeks review of a final order of deportation," and did not necessarily "foreclose judicial review of all claims by aliens arising in the course of deportation proceedings," such as claims that an alien's right to due process in such proceedings had been infringed. *Id.* at 21.

ARGUMENT

1. Petitioner argues (Pet. 10-12) that the court of appeals erred in holding that Section 440(a) of the AEDPA divested it of jurisdiction over his petition for judicial review, which was pending at the time

the AEDPA was enacted. This Court has recently denied review in three cases raising the same issue, and there is no reason for a different result here. See *Mendez-Rosas* v. *INS*, 117 S. Ct. 694 (1997); *Chamorro-Torres* v. *INS*, No. 96-985 (Mar. 3, 1997); *Uwagbale* v. *INS*, No. 96-7454 (Mar. 31, 1997); see also *Qasguargis* v. *INS*, No. 96-806 (Feb. 24, 1997).

a. We note at the outset that petitioner's request for judicial review of the BIA's order is effectively moot, because the Attorney General no longer has the authority to grant the relief—a waiver of deportation under Section 212(c) of the INA—that petitioner seeks. Section 440(d) of the AEDPA amended Section 212(c) of the INA, 8 U.S.C. 1182(c), to exclude from the scope of its discretionary waiver provision "an[y] alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii)" of the INA (previously codified at 8 U.S.C. 1251(a)(2)(A)(iii)). 110 Stat. 1277. Petitioner's drug-trafficking offense is an "aggravated felony" that is "covered in" Section 241(a)(2)(A)(iii). See 8 U.S.C. 1101(a)(43)(B). Thus, petitioner is no longer statutorily eligible for the discretionary relief that he seeks through this proceeding.[1]

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[1] Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (*reproduced at* 142 Cong.Rec. H11,787-H11,833 (daily ed. Sept. 28, 1996)), repeals Section 212(c) in its entirety and replaces it with Section 240A of the INA (to be codified at 8 U.S.C. 1229b), which authorizes a new form of discretionary relief termed "cancellation of removal." See IIRIRA § 304(a)(3) and (b). With certain limited exceptions not applicable here, however, the IIRIRA's provisions respecting cancellation of removal apply only to administrative proceedings initiated on or after April 1, 1997. See IIRIRA

The AEDPA does not specify whether Section 440(d) bars the Attorney General from acting on a petition for relief under Section 212(c) filed on or before the date of the AEDPA's enactment. In her recent decision in a case referred to her by the BIA under 8 C.F.R. 3.1(h)(iii), however, the Attorney General formally determined that Section 440(d) applies to cases that were pending before the Executive Office for Immigration Review on the date of enactment. *In re Soriano* (Feb. 21, 1997).[2] Discretionary relief under the immigration laws is prospective in nature, and the new provision limits the Attorney General's power to confer such relief. *Id.* at 3-6.[3]

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§ 309(a) and (c). In any event, petitioner's drug-trafficking conviction would make him ineligible for relief under the new provisions. See INA § 240A(a)(3) (as amended by IIRIRA), to be codified at 8 U.S.C. 1229b(a)(3).

[2] We have provided petitioner with a copy of the Attorney General's opinion. Because the opinion is not yet published, we have also lodged a copy with the Clerk of this Court.

[3] See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984) ("The deportation hearing looks prospectively to the respondent's right to remain in this country in the future."); see also *Scheidemann* v. *INS*, 83 F.3d 1517, 1523 (3d Cir. 1996) ("Like statutes altering the standards for injunctive relief," changes in the scope of the Attorney General's discretionary authority "ha[ve] only a prospective impact."). Moreover, just as new "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994), the repeal of Section 212(c) speaks to the power of the Attorney General to waive deportation, not to any "right" of an alien to obtain such relief. The principles underlying the application of jurisdictional rules to cases pending in court, discussed below, thus apply equally to cases affecting the Attorney General's power to act. See *Scheidemann*, 83 F.3d at 1523 ("Like statutes constricting the jurisdiction of a judicial body," changes to the

Because the Attorney General lacks any authority under current law to grant petitioner's request for a waiver of deportation under Section 212(c), even a judicial reversal of her previous discretionary decision to deny relief could not avail petitioner now.

b. The court of appeals correctly concluded that Section 440(a) operated immediately to divest it of jurisdiction to review petitioner's pending case. In *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994), this Court explained that "application of new statutes passed after the events in suit is unquestionably proper in many situations." *Id.* at 273. In particular, the Court noted that "intervening statutes conferring or ousting jurisdiction" are ordinarily given immediate effect, "whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. A new law "normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Ibid.*[4]

Landgraf reaffirmed the long-standing principle that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) (citing *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *Gwin* v. *United States*, 184

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class of aliens eligible for Section 212(c) relief "speak only to the power of a public agency.").

[4] Accord *Landgraf*, 511 U.S. at 293 (Scalia, J., concurring in the judgments) ("Our jurisdiction cases are explained * * * by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.").

U.S. 669, 675 (1902); *Gurnee* v. *Patrick County*, 137 U.S. 141, 144 (1890); *Sherman* v. *Grinnell*, 123 U.S. 679, 680 (1887); *Railroad Co.* v. *Grant*, 98 U.S. 398, 401 (1879); and *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). "When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. * * * If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit." *De La Rama Steamship Co.* v. *United States*, 344 U.S. 386, 390 (1953). Accord, *Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870); *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541, 544 (1867).

No provision of the AEDPA preserves the courts of appeals' jurisdiction over petitions for review that were pending at the time of its enactment.[5] Accordingly, Section 440(a) operated immediately to eliminate that jurisdiction. Although the dismissal of pending petitions may disappoint litigants who anticipated a further level of review, a new provision is not impermissible "merely because it * * * upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269. Like other new jurisdictional provisions, Section 440(a) speaks immediately and prospectively

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[5] Section 440(f) of the AEDPA provides that the amendments made by Section 440(e) (relating to modifications made to the definition of "aggravated felony") "apply to convictions entered on or after the date of [enactment]." 110 Stat. 1278. There is no provision regarding the effective date of other subsections of Section 440, however, and provisions relating to various other Sections provide no reliable indication of Congress's intent in that regard. See *Duldulao* v. *INS*, 90 F.3d 396, 398 n.2 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 675 & n.4 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997).

to deny courts the power to review final orders of deportation entered against alien aggravated felons. 511 U.S. at 274.

With the exception of the Seventh Circuit, which deviated from the others in a limited respect not applicable here, every court of appeals that has considered the matter has reached the same conclusion as the court below in this case, resulting in the dismissal of petitions pending before them. See *Figueroa-Rubio* v. *INS*, No. 96-3415 (6th Cir. Mar. 5, 1997); *Boston-Bollers* v. *INS*, 106 F.3d 352, 354-355 (11th Cir. 1997); *Kolster* v. *INS*, 101 F.3d 785, 787-791 (1st Cir. 1996); *Hincapie-Nieto* v. *INS*, 92 F.3d 27, 29 (2d Cir. 1996); *Duldulao* v. *INS*, 90 F.3d 396, 398-400 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 674-676 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997); see also *Sanchez-Rodriguez* v. *INS*, No. 96-9518 (10th Cir. July 12, 1996) (per curiam order dismissing petition for review for lack of jurisdiction).

In *Reyes-Hernandez* v. *INS*, 89 F.3d 490, 492-493 (1996), the Seventh Circuit held that Section 440(a) would not divest the court of jurisdiction to entertain a petition for review filed by an alien who had waived a colorable defense to deportability as part of a litigating strategy based on pre-AEDPA law, in order to focus on a request for discretionary relief under Section 212(c). The court concluded that, under those limited circumstances, "to make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal consequence to the concession, an event that occurred before the new law came into existence." 89 F.3d at 492-493. That conclusion is at odds with this Court's teaching that jurisdictional statutes apply to cases pending at the time of their enactment because they address the power of

the courts, not the expectations of litigants. See *Landgraf*, 511 U.S. at 274-275. Moreover, we share the Second Circuit's skepticism "that any alien concedes deportability only because of the expected possibility of section 212(c) relief and the availability of a petition for review of the denial of such relief." *Hincapie-Nieto*, 92 F.3d at 30. As that court recognized, "[i]t is far more likely that deportability is conceded because there is no conceivable defense available." *Ibid.*

The Seventh Circuit has since limited *Reyes-Hernandez* to its facts. In *Arevalo-Lopez* v. *INS*, 104 F.3d 100 (7th Cir. 1997), the court made clear that it would not assert continuing jurisdiction if the petitioner either contested deportability, or had no colorable defense. See also *Yang* v. *INS*, Nos. 94-3071, 95-3665, 96-1824 & 96-2044 (7th Cir. Mar. 18, 1997), slip op. 9-11 ("*Reyes-Hernandez* is a decision with a limited domain, as *Arevalo-Lopez* properly recognizes—a domain that it would be inappropriate to expand, given the force of precedent in other circuits."). In this case, as in *Arevalo-Lopez*, petitioner contested deportability, but the IJ found him deportable on the basis of the record of his convictions introduced into evidence by the government. Pet. App. 29-30. There is no reason to believe that the Seventh Circuit would have asserted jurisdiction over petitioner's case.

c. The statutory issue petitioner seeks to raise affects only a limited and rapidly diminishing class of cases in which petitions for judicial review brought by alien felons were pending before the courts of appeals when the AEDPA was enacted in April, 1996. Moreover, as noted above, Congress has comprehensively revised the entire statutory framework relating to discretionary relief from deportation, with

general effect as of April 1, 1997. See note 1, *supra*. The question whether Section 440(a)'s amendment of Section 106(a)(10) of the INA—a provision that has now been repealed in its entirety—was or was not immediately effective is therefore of little continuing importance.

2. Petitioner also argues (Pet. 12-14) that Section 440(a)'s preclusion of judicial review in his case violates the Ex Post Facto Clause of the Constitution. Petitioner did not raise that claim in the court of appeals, and the court did not independently pass on the matter. The question is not properly presented to this Court in the first instance. See, *e.g.*, *Heller* v. *Doe*, 509 U.S. 312, 319 (1993); *Demarest* v. *Manspeaker*, 498 U.S. 184, 188-189 (1991).

In any event, petitioner's claim has no merit. The Ex Post Facto Clause bars Congress from "retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal acts." *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990); accord *Lynce* v. *Mathis*, 117 S. Ct. 891, 896 (1997). In the immigration context, this Court has long held that the Clause does not prohibit Congress from making past conduct a new ground for deportation, because "[d]eportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952); see also *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). In *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955), for example, the Court upheld against an Ex Post Facto Clause challenge the deportation of an alien whose 1938 conviction became a ground for deportation under a provision first enacted in 1952. See also *Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (Internal Security Act of 1950 applied to alien whose

deportable acts ceased in 1946); *Harisiades*, *supra* (Alien Registration Act of 1940 applied to aliens whose deportable acts had ceased before enactment); *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924); *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913).

If the Ex Post Facto Clause is not violated by making past criminal conduct, which was not a ground for deportation when committed, a new ground for deportation, there can be no doubt that merely withdrawing the possibility of judicial review of a final order of deportation is permissible under that Clause. As the Court pointed out in *Landgraf*, a new jurisdictional rule, which "speak[s] to the power of the court rather than to the rights or obligations of the parties," generally "takes away no substantive right but simply changes the tribunal that is to hear the case." 511 U.S. at 274. Compare *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977) (Ex Post Facto Clause does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance"); *California Dep't of Corrections* v. *Morales*, 115 S. Ct. 1597, 1602, 1603 (1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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